

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Policies Concerning)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast)	
Stations in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
To: The Commission		

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION
OF BLACK OWNED BROADCASTERS, INC.**

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The National Association of Black Owned Broadcasters, Inc. (“NABOB”), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.¹

I. SUMMARY OF COMMENTS

In its Comments in this proceeding, NABOB demonstrated that the number of minority owners of radio broadcast facilities has decreased by 14% since the passage of the Telecommunications Act of 1996, which permitted major consolidation of ownership of radio broadcast stations into the hands of a few large corporations. NABOB noted that the Commission recognized in the Notice of Proposed Rulemaking in this proceeding that it has a statutory obligation

¹In The Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317, MM Docket No. 00-244, FCC 01-329, released Nov. 9, 2001 (“NPRM”).

to promote diversity of ownership of broadcast facilities. NABOB pointed out that minority ownership has always been recognized by the Commission as a component of diversity of ownership. NABOB requested that the Commission adopt promotion of minority ownership of radio facilities as a primary policy objective in this proceeding. Specifically, NABOB requested that the Commission take the following actions to promote diversity of ownership and minority ownership:

1. The Commission should place greater emphasis on the promotion of diversity of ownership, and with it the promotion of minority ownership, in the radio industry.
2. As a part of its public interest review, the Commission should assess the impact on minority ownership of assignment of license and transfer of control applications.
3. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the radio ownership rules to allow parties exceeding the rules to find potential buyers. Applications proposing to sell stations to third party buyers should be filed simultaneously with assignment and transfer applications which exceed the limits.
4. The Commission should make permanent, with the revisions proposed in NABOB's Comments, the Commission's Interim Policy for processing assignment and transfer applications. In particular, the Commission should consider a 40/60 market share screen for "flagging" potential excessive consolidation in a market, instead of the current 50/70 screen.
5. The Commission should change its radio market definition to correlate with the Arbitron metro market.
6. The Commission should treat all local marketing agreements ("LMA's") as attributable interests.

7. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.

II. THE COMMISSION IS CURRENTLY ALLOWING MANY LICENSEES TO EXCEED THE EIGHT STATION LOCAL MARKET LIMIT

Several parties oppose the use of Arbitron metro markets for defining radio markets. See, NAB Comments at 35²; Cumulus Comments at 15.³ In its Comments, NABOB demonstrated the need for a uniform policy for defining radio markets based upon Arbitron market definitions. NABOB Comments at 7-10. The need for such a definition is graphically demonstrated by the recent issue of the publication Who Owns What. In the May 6, 2002 issue of Who Owns What (attached as Exhibit A), numerous group owners are listed as operating more than 8 radio stations in various Arbitron markets. For example, the following group owners are shown to operate the following number of stations in the indicated markets :

1. Clear Channel
 - a. Los Angeles — 12.
 - b. San Francisco — 10.
 - c. Atlanta — 9.
 - d. San Diego — 12.
 - e. West Palm Beach — 9.
 - f. Jacksonville — 11.
 - g. Louisville — 10.

²Comments of the National Association of Broadcasters (“NAB”), March 27, 2002.

³Comments of Cumulus Media Inc. (“Cumulus”), March 27, 2002.

- h. Youngstown — 9.
 - i. Roanoke — 9.
 - j. Huntington — 9.
- 2. Entercom
 - a. Seattle — 9.
- 3. Citadel
 - a. Wilkes Barre — 10.
 - b. Little Rock — 10.
- 4. Cumulus
 - a. Florence — 10.
- 5. Beasley
 - a. Augusta, Ga. — 9.

These numbers clearly demonstrate that, in the actual markets in which these companies compete for advertising revenues, many group owners are currently able to exceed the statutory ownership limits due to the Commission's failure to develop a definition of radio markets that reflects the realities of the advertising markets in which stations compete.

Indeed, in its Comments, Cumulus boldly touts that it is the licensee of nine radio stations, and time brokers a tenth, in the Florence, South Carolina Arbitron metro. Cumulus Comments at 7. Rather than demonstrating the alleged public interest benefits of consolidation, Cumulus's description of its operations in Florence actually demonstrates the pressing need for a sensible definition of radio markets which will permit the Commission to enforce the eight station local market limit imposed by Section 202(b). With industry consolidation, an increasing number of

group owners are able to sell advertising time on all of their stations in an Arbitron market as a package. Thus, situations such as those listed above, where group owners are able to sell 9, 10 or even 12 stations in a package, place small station owners at an unfair disadvantage. This situation clearly requires enforcement of the eight station limit of Section 202(b). It is equally important to note that, while very revealing, the Who Owns What listing cannot answer the question of how many group owners are exceeding the ownership limits in markets where the maximum number of stations that can be owned is less than eight.

In addition, the numbers identified above for the companies exceeding the eight station limit include some time brokerage and local marketing agreements. These numbers demonstrate that, included in the enforcement of Section 202(b), must be a rule which requires that all time brokerage agreements and local marketing agreements between same market licensees be filed with the Commission and treated as attributable interests, even if they are for less than 15% of a station's broadcast time.

III. THE COMMISSION HAS THE STATUTORY AUTHORITY TO LIMIT THE NUMBER OF STATIONS AN ENTITY MAY OWN IN A MARKET

Several parties have asserted that the Commission has no statutory authority to limit the number of stations a licensee may own in a local market below the levels specified in Section 202(b)(1) of the Communications Act, added by the Telecommunications Act of 1996. See, Clear Channel Comments at 4-13⁴; Cumulus Comments at 3; NAB Comments at 4-15. This position is not supported by a plain reading of the Communications Act. As NABOB noted in its Comments,

⁴Comments of Clear Channel Communications, Inc. ("Clear Channel"), March 27, 2002.

the Telecommunications Act of 1996 did not change Sections 309(a) and 310(d). NABOB Comments at 12-14. The Commission and the courts have historically interpreted Sections 309(a) and 310(d) as providing the Commission broad discretion under its obligation to regulate in the public interest. See e.g. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (upholding the Commission's newspaper/broadcast cross ownership rule); see also, Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986); AT&T Corp. v. Iowa Util. Bd., 119 S.Ct. 721 (1999); and City of New York v. FCC, 486 U.S. 57 (1998) (regarding the Commission's broad authority under the Communications Act). There is nothing in Section 202(b) which limits the Commission's authority under Sections 309(a) and 310(d).

NABOB notes that Viacom devotes most of its Comments to arguing for total repeal of the Commission's ownership rules.⁵ Viacom's Comments fail to present evidence justifying repeal. Viacom argues that broadcast television, cable and satellite television, the internet and print media are adequate substitutes for radio. Viacom Comments at 14-20. This is not a valid argument. Radio is a unique, irreplaceable source of news and information. Radio, unlike broadcast television, cable and satellite television, the internet and print media, is uniquely mobile and reaches a very large segment of the population in their automobiles. Indeed, Viacom cites a study showing that 11% of Americans list radio as their primary source of local news. Viacom Comments at 16. In a nation of approximately 220 million persons of age 12 or over⁶ (the population segment measured by Arbitron), this equates to approximately 24 million Americans who identify radio as their primary

⁵Comments of Viacom, Inc. ("Viacom"), March 27, 2002.

⁶Source, U.S. Department of Health and Human Services, Administration on Aging, website: www.aoa.gov.

source of local news. The Commission must take no action which would fail to provide this huge radio audience a diverse and antagonistic range of voices for the presentation of news and information.

IV. VIEWPOINT DIVERSITY AND SOURCE DIVERSITY ARE THE PRINCIPAL POLICIES WHICH THE COMMISSION SHOULD PROMOTE TO ASSURE THE FIRST AMENDMENT OBJECTIVES OF THE COMMUNICATIONS ACT

Several parties suggest that the Commission should emphasize the promotion of programming diversity, instead of viewpoint and source diversity, in its ownership rules. Clear Channel Comments at 14-19; NAB Comments at 15-23. In its Comments, NABOB demonstrated that the Commission must promote viewpoint and source diversity. NABOB Comments at 5-7. The First Amendment requires that the American public receive its news and information from a variety of antagonistic sources. *Id.* This can only come from broadcast voices controlled by diverse competing owners. *Id.*

NABOB notes that programming diversity has some benefits. In its Comments, Radio One, a NABOB member, points out that it is able to provide a diverse number of programming formats targeting African American audiences in markets where Radio One owns several stations. NABOB applauds Radio One's accomplishments. However, as demonstrated in the studies submitted by the United Church of Christ, discussed below, consolidation by itself does not result in programming diversity. NABOB submits that it is primarily the personal commitment to serve the African American community of the controlling shareholders of Radio One which has led to the diversity of programming being offered by Radio One.

V. NABOB SUPPORTS RADIO ONE’S REQUEST THAT THE COMMISSION AVOID CHANGING ITS RULES IN A MANNER WHICH MAKES IT DIFFICULT FOR NEW ENTRANTS TO COMPETE

In its Comments, Radio One points out that the Commission should not change its rules in a manner that permits existing market consolidation to be protected, but bars new entrants entering a market from obtaining a comparable level of consolidation. Radio One Comments at 11. NABOB supports this position. NABOB recognizes that there are many markets where existing licensees have obtained -- and sometimes flagrantly exceeded -- the full number of stations permitted by the ownership limitations of Section 202(b) of the Act. If the Commission changes its rules as proposed by NABOB herein, a new competitor coming into a market may be restricted from acquiring the same number of stations that an existing operator might have in that market.

To avoid this result, NABOB suggests that, should the Commission adopt NABOB’s proposals for limiting concentration in local markets, the Commission permit an entity acquiring stations in a market to demonstrate that it is in the public interest for it to be allowed to acquire as many stations, and obtain market share up to an amount equal to that of, the largest existing competitor in the market. This policy would assure that the Commission would not inadvertently grandfather a protected market status for parties currently dominating their markets.

VI. THE COMMISSION SHOULD GIVE SIGNIFICANT WEIGHT TO THE STUDIES PROVIDED BY THE UNITED CHURCH OF CHRIST

In its Comments, the United Church of Christ (“UCC”) provides the Commission with excellent information concerning concentration in radio markets. UCC Comments at 14-20. UCC provides the “UCC Local Radio Ownership and Market Concentration Study” and UCC “Herfindahl-

Hirschman Index Chart for Radio.” UCC demonstrates that the number of owners of radio stations decreased from 5100 in 1996, to 3800 in 2001, a decrease of 25%. UCC Comments at 14. In 33 local markets of varying sizes researched by UCC, the number of independent owners decreased in 28 of those 33 markets. Id at 15. Moreover, this decrease in the number of owners occurred while the number of stations identified by Arbitron in each of these 33 markets grew. Id.

In two of the specific markets about which the Commission requested detailed information, Syracuse, New York and Rockford, Illinois, UCC shows that this national trend is reflected in these markets also. In 1993, the Syracuse Arbitron market had 27 commercial radio stations owned by 17 companies. By 2001, independent radio station ownership in the market had dropped to 9 companies, even though Arbitron reported 5 additional commercial radio stations competing in the market. Similarly, UCC shows that in Rockford independent ownership dropped from 7 owners to 5 owners. Id. at 16.

UCC goes on to demonstrate that, contrary to the assertions of some parties, the alleged benefits of programming diversity have not been achieved by all of this consolidation of ownership. UCC shows that, of 17 markets studied by UCC, the number of stations added to the Arbitron markets increased by 5.7 stations. However, the increase in radio formats during this time period only increased by 1.5 formats. Thus, the evidence refutes the assertion that increased consolidation provides public interest benefits in the form of more diverse programming.

UCC also demonstrates that the U.S. Department of Justice Herfindahl-Hirschman Index (“HHI”) shows that there is a high amount of concentration in the radio markets measured. UCC shows that in the 33 markets measured, 28 had an HHI above 1800, the level considered high by the Department of Justice. Id at 18. Moreover, more than half of the markets had an HHI above 3000,

a level considered far beyond that of a highly concentrated market – demonstrating that most of the measured markets lack effective competition. Id.

Thus, the UCC studies clearly demonstrate that, due to consolidation, there is very little competition remaining in most radio markets.

VII. CONCLUSION

NABOB and other parties have demonstrated that consolidation of ownership in the radio industry is having a negative impact on viewpoint and source diversity, and on minority ownership, which is an important part of viewpoint and source diversity. The Commission has the statutory obligation to promote the public interest, and this obligation carries with it the authority and the obligation to deny an entity the opportunity to own radio stations where such ownership will create an undue concentration of control of radio facilities. This is true regardless of whether the entity has reached the maximum number of stations in a local market permitted by the Act. The Commission should adopt policies in this proceeding to enhance viewpoint and source diversity, and stem the tide of consolidation which is destroying viewpoint and source diversity, and which is reducing the number of minority broadcast stations owners.

NABOB submits that the Commission should implement the actions and policies set forth in NABOB's Comments to promote diversity of viewpoint and minority ownership and to curtail the continuing negative effects of industry consolidation.

Respectfully submitted,

**THE NATIONAL ASSOCIATION OF BLACK
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